

**STATE OF RHODE AND PROVIDENCE PLANTATIONS
BEFORE THE PUBLIC UTILITIES COMMISSION**

**IN RE: THE NARRAGANSETT ELECTRIC)
COMPANY INVESTIGATION OF PROPOSED) Docket No. 4065
TARIFF CHANGES)**

**THE DIVISION’S OBJECTION TO AND MOTION TO STRIKE COMPANY
RESPONSE TO COMMISSION RECORD REQUEST NO. 12 AND TO BAR
TESTIMONY OF MICHAEL D. LAFLAMME**

On December 1, 2009, the Narragansett Electric Company (the “Company”) submitted a Data Response entitled “Investigation of Proposed Tariff Changes Revenue Decoupling Pro Forma Example” prepared by or under the supervision of Michael D. Laflamme (“Response”).¹ During the morning hearing session on December 2, 2009, the Company requested the Commission and/or its counsel to present Mr. Laflamme to the Commission on one of the days reserved for hearing during the week of December 6,

¹ The Record appears to reflect that neither the Chairman nor any of the parties’ counsel ever issued a data request to the Company as represented by the Company in the Response. Initially, the Chairman suggested that it would be helpful if the Commission had a “formula containing numbers.” 11/4/2009 Tr. at 42. Ms. Lucarelli then observed there already “was a data request with actual numbers.” Id. at 43. At the commencement of TEC-RI’s cross-examination of Dr. Tierney, Mr. McElroy suggested, but did not formally request, the Company to make a small “pro forma filing.” Id. at 61. The following colloquy then transpired:

MR. KEEGAN: On redirect I will have Dr. Tierney go through a little more detail and try to clarify that. We did in Mr. O’Brien’s testimony attempt to apply numbers to the company’s proposal in Exhibit NG-RLO-7.

THE CHAIRMAN: why don’t we see how it goes but leave open the possibility, because anything, quite frankly, which can help all of us would be appreciated. This is a very complex hearing.

MR. KEEGAN: We’ll do that.

THE CHAIRMAN: If we get to a point you’re not satisfied with the answers given by either Dr. Tierney or Mr. O’Brien, they’ll do that.

Id. at 62. At no subsequent time during the proceedings did Mr. McElroy ever express any dissatisfaction with the answers of Dr. Tierney or Mr. O’Brien. Nowhere could the Division find in the Record that the Chairman or the “Commission” ever directed the Company to provide the Response, or for that matter, oral testimony of a previously unidentified witness to support the Response. Rule 1.20(i), therefore, is inapplicable.

2009 (December 7, 2009 - December 11, 2009) in order to “explain” the Response to the Commission. The Division orally objected to the Company’s request, and indicated that the Division intended to file a written motion and opposition to both the response and the proposed testimony of Mr. Laflamme.

During the afternoon hearing session on December 2, 2009, the Chairman indicated that he had conferred with his colleagues and that all three commissioners were inclined to permit Mr. Laflamme to make a presentation regarding the Response. There would, according to the Chairman, therefore, be no need for the Division to file a motion. The Chairman indicated that the “presentation” would take place on one of the reserve days, Wednesday, December 9, 2009, that had been reserved for further hearing of identified and scheduled witnesses. Upon further inquiry from the Division regarding the evidentiary parameters of the “presentation,” the Chairman indicated that the Division would have an opportunity to cross-examine Mr. Laflamme, and to present Mr. Oliver if the Division were so inclined.

I.

Rule 1.18(c)(6) of the Commission’s Rules of Practice and Procedure (the “Rules”) mandates that “[d]ata requests and responses, though part of the docket, are not evidence unless admitted during a hearing, or consent by the parties.” Since the Division objects to the admission of the Response, in order for the Response to become part of the evidentiary Record, the Commission must conduct “a hearing.” Rule 1.20(e)(4) governs the hearing process. That rule, in pertinent part, provides, “the filing and service of testimony and exhibits by the Division and any other party *shall be in accordance with the pre-hearing conference schedule, if any.*” (Emphasis added).

On June 30, 2009, pursuant to a pre-hearing conference, the Commission issued the schedule (the “Schedule”) for Docket No. 4065. The Schedule established, among other things, the dates “on which filings were to be submitted in the docket,” as well as hearing dates for identified witnesses to provide testimony. All pre-filed direct, rebuttal and surrebuttal testimony were to be filed in written, question and answer form pursuant to Rule 1.20(e)(1) & (2) by September 15, 2009, October 6, 2009 and October 27, 2009, respectively. The Schedule, moreover, required that “all parties shall submit a list of the witnesses it intends to call to testify...”, and provide executive summaries of their testimony.

Under the Rules, the Company was required to comply with the requirements of the Schedule. However, the Company did not identify Mr. Laflamme as a witness in this proceeding as required by the Schedule thereby violating Rule 1.20(e)(4). Nor did the Company file Mr. Laflamme’s proposed testimony by the requisite filing dates or in the appropriate written, question and answer form as mandated by the Schedule, thereby violating Rule 1.20(e)(1) & (2). The Company has not provided an executive summary of Mr. Laflamme’s testimony, again violating the terms of the Schedule and Rule 1.20(e)(4).

By permitting Mr. Laflamme—a new, heretofore unidentified and unscheduled witness—to provide oral testimony at hearing in contravention of the Schedule’s deadlines, filing and other requirements, the Commission has violated its own Rules. This the Commission may not do. Rotinsulu v. Mukasey, 515 F.3d 68, 72 (1st Cir. 2008) (the failure to follow an applicable regulation may be a sufficient ground for vacation of an agency’s decision); Arizona Grocery Co. v. Atchison, T. & S.F.R. Co.,

284 U.S. 370, 389-90 (1932) (commissions may not arbitrarily ignore their own pronouncements made in quasi-judicial capacity); Appeal of Gielen, 652 A.2d 144, 147 (N.H. 1977); Yashar v. Whitehouse, 1996 WL 936992 (R.I. Super. Ct. 1996) (the Rhode Island APA requires administrative agencies to follow their own rules and regulations).

II

The proposed testimony of Mr. Laflamme represents a transparent attempt by the Company to re-present its direct case through additional testimony on the issue of decoupling after having failed to satisfy its burden of proof under G.L. § 39-3-12 in accordance with the procedural framework designated in the Schedule.

As discussed above in footnote 1, neither the Commission nor any one else ever requested the Company to provide the Response. Nor did anyone ever request the Company to present the Response to the Commission through testimony at hearing of an unidentified, non-listed witness such as Mr. Laflamme. Yet the Commission, without the benefit of consulting Division counsel, or apparently reviewing the transcript of the proceedings, readily accepted the Company's suggestion to proffer the Response and Testimony of Mr. Laflamme, a previously unidentified witness in the proceeding.

The Company is not now permitted to cure flaws in its direct case by supplementary evidence offered under the guise of a record response. Such procedural legerdemain turns G.L. § 39-3-12 on its head, shifting the burden of proof to the Division. That is, the Division is now placed in the position of having to rebut facts and conclusions, which were not part of the Company's direct case. Again, the Commission is barred from proceeding in such a fashion. E.g., United States v. Public Utilities Comm'n, 393 A.2d 1092, 1094 (R.I. 1978) (incorrect assignment of burden of proof is

error); Michaelson v. New England Tel. & Tel., 404 A.2d 799, 806 (R.I. 1979) (incorrect assignment of the burden proof to the Division is error).

III

The Rhode Island Supreme Court has held that in any contested hearing under the Administrative Procedures Act (as is the pending matter), parties possess the fundamental rights of adequate notice and opportunity to be heard. These fundamental rights include the right to possess adequate time to prepare for hearing, the right to retain consultants of appropriate expertise to assist in that preparation, and the right to present evidence and the right of cross-examination. G.L. § 42-35-9(c) (parties shall be afforded to respond and present evidence and argument on *all* issues involved); G.L. § 42-35-9(g) (“findings of fact shall be based exclusively on the evidence and matters officially noticed); G.L. § 42-35-10(c) (parties possess the right to conduct cross examination); Hillside Assoc. v Stravato, 642 A.2d 664, 667 (R.I. 1994) (where the Rhode Island Supreme Court recognized these fundamental rights of parties to an administrative proceeding).

By directing that Mr. Laflamme’s testimony will occur on December 9, 2009 without affording the Division sufficient opportunity to prepare or participate at hearing, the Commission has deprived Division its rights of notice and opportunity to be heard, including but not limited to, the aforementioned fundamental rights.

CONCLUSION

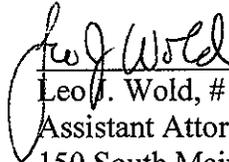
For the reasons, set forth herein, the Division:

- (i) Objects to the Response;
- (ii) Moves to Strike the Response; and

- (iii) Requests that the Commission bar Michael D. Laflamme from testifying in Docket No. 4065.

DIVISION OF PUBLIC UTILITIES AND
CARRIERS

By its attorneys,



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CERTIFICATE OF SERVICE

I certify that a copy of the within document was forwarded by e-mail to the Service List in Docket No. 4065 on the 2nd day of December, 2009.

